United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1081

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

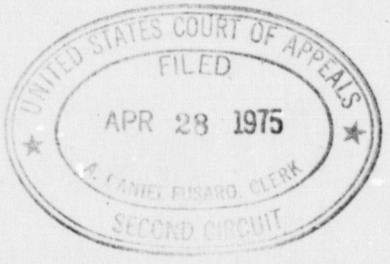
FERNANDO ECHEONA-MENDOZA,

Appellant.

Docket No. 75-1081

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court erred in permitting the Government to redact part of the statement of one of its principal witnesses before turning it over to the defense.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen) rendered March 14, 1975, after a jury trial, convicting appellant Echeona-Mendoza of conspiracy to import, possess, and distribute cocaine, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), 942(a), 960(a)(1), and 960(b)(1) of Title 21, United States Code (Count One), and of attempted possession and possession with intent to distribute one kilogram of cocaine, in violation of Sections 812, 841(a)(1), 841(b)(1)(A), and 846 of Title 21, United States Code (Count Two). Mr. Echeona-Mendoza was sentenced to four years' imprisonment and three years' special parole on each count, the sentences to run concurrently.

The Federal Defender Services Unit of The Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

The Government's principal witnesses in this case were two alleged co-conspirators, Raul Alvarez-Diaz and Roberto Antonia Albarracin-Gomez. Both witnesses testified to meeting appellant Echeona-Mendoza in Colombia and to reaching an agreement, in

concert with one Pablo Selgado and one Rafael Vergara, to import cocaine from Colombia into the United States (24-25, 110-119). According to these two witnesses, the details of the agreement were that Selgado or Vergara was to arrange for the transporting of shipments of cocaine to New York, where they were to be delivered to Alvarez-Diaz, who would attempt to locate a buyer. If he failed to do so, he was to deliver the cocaine to Echeona-Mendoza, who would attempt to find a buyer (37-38).

These two witnesses claimed that, pursuant to this alleged agreement, the first transaction took place in November 1973, with Vergara bringing one-half kilogram of cocaine from Colombia to New York and delivering it to Alvarez-Diaz in Echeona-Mendoza's presence. Alvarez-Diaz found a buyer for the drugs, kept $1,000 of the proceeds of the sale for himself, paid $1,000 to Echeona-Mendoza, and turned the rest over to Vergara (30-36, 119).

The two alleged co-conspirators claimed that the second transaction took place in April 1974, with Vergara sending Albarracin-Gomez from Colombia to New York with one-half kilogram of cocaine, which was delivered directly to Alvarez-Diaz. Alvarez-Diaz in turn sold the drugs, paying a commission of $500 to Echeona-Mendoza (39-45, 119-124).

According to the two alleged co-conspirators, the third attempted transaction occurred in June 1974, with Vergara again sending the drugs directly to Alvarez-Diaz via an unidentified woman. Alvarez-Diaz refused to accept the drugs, however, be-

cause they were synthetic. He then informed Echeona-Mendoza that he did not want to do any further business with Vergara (46-49).

According to Alvarez-Diaz, Echeona-Mendoza later told him of another transaction which allegedly occurred in June 1974, involving drugs sent by Selgado, which were sold while Alvarez-Diaz was out of town (50).

Alvarez-Diaz and Albarracin-Gomez claimed that the final attempted transaction occurred in November 1974. At that time, Vergara sent Albarracin-Gomez from Colombia to New York with one kilogram of cocaine. Seven hundred grams of this shipment were discovered by Colombian airport police, who seized it but for $200 allowed Albarracin-Gomez to continue his journey to the United States. When he arrived in Miami en route to New New York, United States Customs agents discovered the remaining 300 grams of cocaine and arrested him. Albarracin-Gomez made a statement to the agents at that time and agreed to cooperate with them by completing the delivery of the drugs to Alvarez-Diaz in New York under their surveillance (124-131).

When Albaracin-Gomez delivered the drugs to Alvarez-Diaz, the latter was arrested by the agents. Alvarez-Diaz then also agreed to cooperate with the agents, alleging to them that the intended recipient of the cocaine was Echeona-Mendoza. He then made a phone call to Echeona-Mendoza, which was recorded, in which he did not mention cocaine in literal or slang terms, but made reference to someone arriving from Colombia. Alvarez-Diaz

and Echeona-Mendoza agreed in that conversation to meet later that evening in Alvarez-Diaz' car outside Echeona-Mendoza's apartment (52-76).

The agents sent Alvarez-Diaz to that meeting with a "dummy" kilogram of powder containing a small amount of the original shipment of cocaine and other, non-narcotic powder. Alvarez-Diaz claimed that after Echeona-Mendoza entered the car, Albarez-Diaz handed him the bag of powder, saying it was one kilogram of cocaine, and that Echeona-Mendoza put the bag on the floor of the car. Almost immediately thereafter, agents stopped the car and arrested Echeona-Mendoza (76-78).

After Albarracin-Gomez's direct testimony, the Government turned over to defense counsel a redacted portion of that witness's statement to the agents following his arrest. Defense counsel objected to the redaction first on the ground that it was not a redaction authorized under 18 U.S.C. §3500 (132) and later because the redacted material was subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963) (211-216, 218-223). The Government turned a complete text of the statement over to the judge, who apparently approved the redaction after in camera examination. The Government justified the redation by saying that the redacted material concerned

> ... active investigations and the names of the people under investigation [which] the Government doesn't believe should be turned over to the defendant, and it relates in no way to the facts in this case.
>
> (220).

Except for the testimony of the two alleged co-conspirators, the Government's evidence against Echeona-Mendoza consisted of a tape-recording of the Alvarez-Diaz conversation (62-76), and the testimony of the agents as to the arrest of Alvarez-Diaz and Albarracin-Gomez, the preparation of the "dummy" load of cocaine, and the arrest of Echeona-Mendoza (136-188, 198-208). Concerning the latter, the agents testified that after his arrest Echeona-Mendoza acknowledged having received a telephone call from Alvarez-Diaz, but that he had understood him to mean that Alvarez-Diaz had news of Echeona-Mendoza's family in Colombia and that he wanted to come up to give him the news (187). Echeona-Mendoza also said that he had met Alvarez-Diaz in Colombia several years earlier, but had seen him only once in New York prior to the night of his arrest (188).

Echeona-Mendoza testified in his own behalf, explaining that he had met both Albarracin-Gomez and Alvarez-Diaz in Colombia, but had never agreed to transact in drugs with them (228-230). He explained that he had encountered Alvarez-Diaz in New York once, and had at that time given him his phone number (231-233). Concerning the taped telephone conversation, Echeona-Mendoza explained that he thought Alvarez-Diaz was saying that he was in trouble and needed

some money and also that some friends of his had just arrived from Colombia with news of Echeona-Mendoza's family (234-8, 270-76). He insisted that he did not know, when he was arrested shortly after getting into Alvarez-Diaz's car, that the bag on the floor of the car contained cocaine (240-41). He testified that he was innocent of the crimes charged, and that Alvarez-Diaz and Albarracin-Gomez had made it appear that he was the intended recipient of the drugs in order to mitigate their own criminal involvement and thus their eventual sentence while still protecting other individuals with whom they were actually transacting in drugs (230, 233, 240-41, 244, 257, 271, 275-6, 279-281, 294, 306, 310, 313-14, 326- 336, 337).

On cross-examination, Echeona-Mendoza conceded that he may have been mistaken about the date when he had first encountered Alvarez-Diaz in New York and given him his phone number (295-6316).

On rebuttal, the Government called a representative of the phone company, who testified that the phone, the number to which Echeona-Mendoza had given to Alvarez-Diaz, had not been connected until after the time when Echeona-Mendoza said he had given out the number (346).

The Government, in its summation, conceded that "most

of the [Government's] evidence comes from" Albarracin-Gomez and Alvarez-Diaz (375).

Similarly, the Court, in its charge to the jury, stated that Albarracin-Gomez and Alvarez-Diaz "testified to a substantial extent here" and that the Government "relies" on their testimony (447).

The jury deliberated for the better part of two days before returning a verdict of guilty on both counts.

ARGUMENT

THE DISTRICT COURT ERRED IN PERMITTING THE GOVERNMENT TO REDACT PART OF THE STATEMENT OF ONE OF ITS PRINCIPAL WITNESSES BEFORE TURNING IT OVER TO THE DEFENSE.

Both the Court and the Government acknowledged that the prosecution's principal evidence against appellant Echeona-Mendoza in this case was the testimony of the two alleged co-conspirators, Raul Alvarez-Diaz and Roberto Antonia Albarracin-Gomez. It was their testimony that Echeona-Mendoza had entered into an agreement with them and persons in Colombia to receive and distribute cocaine brought into the United States from that country. Other than the testimony of these co-conspirators, the Government relied on a tape recording of a phone conversation between Alvarez-Diaz and Echeona-Mendoza, a conversation which occurred after Alvarez-Diaz had been arrested and had agreed to cooperate with the agents by incriminating other persons. In that conversation, which contained no reference to cocaine or any other narcotics, literally or in slang terms, Echeona-Mendoza only agreed to meet Alvarez-Diaz in his car outside Echeona-Mendoza's apartment. The agents then sent Alvarez-Diaz, with a "dummy" load of cocaine, to this meeting.

Moments after Echeona-Mendoza entered Alvarez-Diaz' car, he was arrested. The "dummy" load was found not in Echeona-Mendoza's physical possession, but rather on the floor of the passenger side of the car where he had just seated himself.

Echeona-Mendoza testified in his own defense, explaining that although he knew Alvarez-Diaz and Albarracin-Gomez, he had never agreed to participate with them in a conspiracy to distribute cocaine. He explained that when Alvarez-Diaz telephoned him, he thought either that Alvarez-Diaz was in some sort of trouble or that he had news of Echeona-Mendoza's relatives from visitors who had just arrived from Colombia. Echeona-Mendoza agreed to meet Alvarez-Diaz for that reason, and not because he was participating in a cocaine transaction. He testified that he did not know that the bag found in the car when he was arrested contained cocaine. He claimed, both in his testimony and in his defense counsel's summation, that he was innocent of the crimes charged and that Alvarez-Diaz and Albarracin-Gomez had made it appear that he was the intended recipient of the drugs in order to mitigate their own criminal involvement, and thus their eventual sentence, while still protecting other individuals with whom they were actually transacting in drugs.

The question of Echeona-Mendoza's guilt or innocence thus turned on the jury's decision as to whether to believe Echeona-Mendoza, a man with no prior criminal record, or the testimony of two alleged co-conspirators, admitted drug dealers with a

history of other crimes and convictions. That this determination was a close question is evidenced by the fact that the jury deliberated for the better part of two days before reaching a verdict.

After the direct examination of Albarracin-Gomez, the Government, pursuant to the requirements of the Jencks Act, 18 U.S.C. §3500, turned over a redacted portion of this statement to federal agents. When defense counsel objected to the redaction, the entire statement was turned over to the District Court for inspection in camera. At the close of the Government's case, defense counsel again objected to the redaction, this time on the grounds that the disclosure of the redacted portion was also required under Brady v. Maryland, 373 U.S. 83 (1963).

Although defense counsel and appellate counsel are, by virtue of the in camera inspection of the redacted portion, unable knowledgably to discuss the details of that statement, the Government's vague references to that statement indicate that it included a description of Albarracin-Gomez's other current criminal activities. Since that witness' admitted principal criminal activity was transacting in drugs, it is reasonable to infer that these other current criminal activities were drug-related. Moreover, since Albarracin-Gomez and the Government's other principal witness, Alvarez-

Diaz, were admitted partners in crime, it is reasonable to infer that the redacted portion of Albarracin-Gomez' statement also described other current criminal activities of Alvarez-Diaz.

Under 18 U.S.C. §3500, the Government is required to turn over to the defense the entire statement of a government witness unless the District Court determines that the portion of the statement which the Government wishes to redact "does not relate to the subject matter of the testimony of the witness." Similarly, Brady v. Maryland, supra, 373 U.S. at 87, requires that the prosecution turn over to the defense any "evidence favorable to an accused ... where the evidence is material either to guilt or to punishment...." This Court has repeatedly held that evidence which could be used by the defense to impeach an alleged co-conspirator testifying as a government witness is either §3500 material or Brady material or both, which must be turned over to the defense. See, e.g., United States v. Seijo, slip opinion ____, Doc. Nos. 74-2312, 74-2436 (2d Cir., April 23, 1975); United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974); United States v. Sperling 506 F.2d 1323 (2d Cir. 1974); United States v. Pacelli, 491 F.2d 1108, 1109 (2d Cir. 1973); United States v. Pfingst, 447 F.2d 177, 194-195 (2d Cir. 1973); United States v. Polisi, 416 F.2d 573, 577-579 (2d Cir. 1969); see also United States v. Mayersohn, 452 F.2d 521 (2d Cir. 1971).

Based on the Government's description of the redacted material, it appears the this material was subject to disclosure under §3500 and Brady on four grounds. First, the redacted material clearly included admissions by Albarracin-Gomez of his other current criminal activites, admissions which could be used to impeach his character and the credibility of his testimony in this case. See e.g. United States v. Seijo, supra.

Secondly,the redacted material apparently contained detailed information of Albarracin-Gomez's current participation in drug transactions with other individuals not identified at trial. As such, it would lend credibility to appellant Echeona-Mendoza's claim that he was innocent of the crimes charged, and that Albarracin-Gomez and Alvarez-Diaz were actually transacting in drugs with other persons but had entrapped Echeona-Mendoza in order to protect the persons to whom the drugs were actually to be delivered.

Thirdly, to the extent that the redacted material also incriminated Alvarez-Diaz in these other current criminal

activities, it could be used to impeach that witness's character and the credibility of his testimony as a Government witness in this trial.

Finally, to the extent that the redacted material named other persons with whom Albarracin-Gomez and Alvarez-Diaz were dealing in drugs, it provided potential witnesses who might be called by the defense to contradict details of Albarracin-Gomez's and Alvarez-Diaz's testimony or their claims that Echeona-Mendoza was a participant in the charged conspiracy or that he was the intended recipient of the seized drugs.

Consequently, the Government was in error in claiming that the redacted material did not relate to the subject matter of the testimony of the witness (18 U.S.C. §3500(c)). Brady v. Marland, supra. See also United States v. Badalamente, supra; United States v. Sperling, supra, United States v. Polisi, supra; United States v. Mayersohn, supra. Since the redacted material was subject to disclosure under 18 U.S.C. §3500(c), Brady, and the decisions of this Court, the District Court erred in permitting the redaction.

The Government's other claim, that the material should be redacted because it involved information concerning "active

investigations and the names of the people under investigation [which] the Government doesn't believe, should be turned over to the defendant . . . " (220) is not a ground under which redaction is authorized under either 18 U.S.C. §3500(c) or Brady, but rather a claim of "state secret privilege" (See, 8 Wigmore, On Evidence, §2378 (1961); United States v. Reynolds, 345 U.S. 1, 6 (1953). Such a claim is insufficient to permit denial of Echeona-Mendoza's statutory and constitutional right to disclusure of the redacted material in this case. The state secret privilege has repeatedly been held not to permit the Governmet or the Court to deny a defendant his statutory or constitutional right to discover information relevant to his case. In instances where the Government persists in its claim of this privilege, and the effect will be to deny a defendant his constitutional or statutory rights, the only proper procedure is for the Court either to strike the affected testimony or declare a mistrial. 18 U.S.C. §3500(d); United States v. Reynolds, supra, 345 U.S. at 12; United States v. Annolschek, 142 F.2d 503 (2d Cir. 1944); United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

It is thus, respectfully submitted that the redaction of the material in question was error requiring reversal of

appellant Echeona-Mendoza's conviction. If however, this Court, after examining the redacted material and considering the arguments made in this brief does not reach this conclusion, it is respectfully requested that the Court follow the procedure established in United States v. Bell, 464 F.2d 667 (2d Cir. 1972) and United States v. Clark, 475 U.S. 240 (1973), which would allow appellate counsel to examine the redacted material under oath not to disclose it, and submit a sealed brief and orally argue in closed court the significance of the material and the reasons why its disclosure was required under the Jencks Act and Brady.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the case remanded for a new trial; alternatively, appellate counsel should be permitted to examine the redacted material under oath not to disclose it, to submit a sealed brief, and to argue orally in closed court the significance of the materials and the reasons why its disclosure was required under the Jencks Act and Brady.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel

Certificate of Service

4/28, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Michael B. Q